Id. Raystay provided Mr. Hoover with various transmitter locations in which it had an interest. Mr. Hoover performed studies of the available frequencies at these locations, which included Red Lion, Lebanon and Lancaster. Glendale Ex. 224 at 10. The record contains copies of the reports of the three frequency studies by Mr. Hoover for Red Lion, Lebanon and Lancaster. Glendale Ex. 224 at 47-75. These are comprehensive documents, with a lengthy and detailed narrative, a tabulation of mileage separations for each available frequency, and a tentative coverage map for each available frequency. Id.

29. Engineering work to secure FAA clearances of the three sites with Red Lion as the lead application for FAA consideration of "EMI" problems associated with all three transmitter sites. Mr. Berfield was aware that Mr. Hoover was responsible for securing FAA clearances, and that such clearances were needed for only three sites, not five. Glendale Ex. 224 at 11, 76-112. He was also aware that in securing FAA clearance for the three sites, particularly the Red Lion site which was the lead site studied by the FAA, there were problems involving electromagnetic interference (EMI) which required more extensive correspondence than normal between Mr. Hoover and the FAA. Id. When the FAA inquired about EMI at the Red Lion site, Mr. Hoover had correspondence and conversations with a transmitter manufacturer concerning the EMI problem. Glendale Ex. 224 at 79 . When Mr. Hoover wrote a response to the FAA concerning EMI for Red Lion, the response contained a showing from the transmitter vendor.

Glendale Ex. 224 at 80, 82. When Mr. Hoover later prepared responses to the FAA for Lebanon and Lancaster, he used the same showing. Glendale Ex. 224 at 99, 107.

30. Engineering portions of FCC applications involved less work per application for the two applications each for Lebanon and for Lancaster than for the single application for Red Lion. Mr. Berfield was aware that the engineering portions of two applications for the same site involved less work per application than a single application for Red Lion. Glendale Ex. 224 at 10-11. When the engineering portions of the two applications for Lebanon, or the two applications for Lancaster, are compared, the extent of the repetition and duplication is clear.

31. Taking the two applications for Lancaster (TBF Exs. 203 and 204), for example, the engineering sections of FCC Form 346 are identical except for the channel numbers and offsets in Question 2, the length and efficiency of the transmission lines in Question 4, and certain information in Question 5. Compare TBF Exs. 203-204 at 11-12. Section I of the two engineering statements is identical except for two places where the channel numbers are different and one place where there are different ERP figures. Ibid at 13. Section IIA of each engineering statement is identical. Ibid at 13-14. Sections IIB and IIC of the engineering statements are identical except for different figures for centers of radiation, lobe orientation, ERP and efficiency. Ibid at 14-15. The two Sections IID are identical. Ibid at 15.

32. Section IIIA of each statement is identical except for

differences in channel numbers. TBF Exs. 203-204 at 15. The two Sections IIIB are identical up until the equation PD'=(1.6)squared PD. Ibid at 15-16. The subsequent paragraphs contain the same calculations of the power density for both Channel 23 and Channel 31. Ibid at 16-17. The last paragraphs of the respective Sections IIIB are identical except for the transposition of channel numbers. Ibid at 17-18. Section IV of the engineering statements is identical except for different channel numbers and offsets. Ibid at 18. Figures IA, IB, 2, 3 and 6 of the two statements are identical except for different channel numbers and labels. Compare TBF Ex. 203 at 19-22, 24 and TBF Ex. 204 at 19-22, 25. The two Figure 4's are identical except for different main lobe orientations and channel numbers. TBF Exs. 203-204 at 23. The two Figure 5's are different. Compare TBF Ex. 203 at 25 and TBF Ex. 204 at 24.

33. Mr. Berfield knew that Mr. Hoover had done the Red Lion portion of the FCC application first. Glendale Ex. 224 at 27-29, Tr. 5511. Accordingly, the Red Lion engineering section of the application was the lead application in Mr. Hoover's work process the same as it had been the lead application in Mr. Berfield's work process.

34. Mr. Berfield's allocation was a reasonable one. Given the entire mix of considerations -- the preparation of three comprehensive frequency studies and reports for the three transmitter locations at Red Lion, Lebanon and Lancaster, the filing and prosecution of FAA clearance requests for those three

locations with Red Lion serving as the lead case in dealing with EMI complications applicable to all three locations, the fact that Red Lion was the lead application for the preparation of the engineering portion of the FCC applications, and the extensive duplication of the engineering portions of two applications for the same site in Lebanon and the two applications for the same site in Lancaster -- Mr. Berfield's allocation of one-third of the engineering fee to Red Lion on the premise that approximately one-third of the engineering work related to Red Lion was a reasonable judgment on his part that has now been borne out on the record in this proceeding.

35. When an additional payment to the engineer not known by Mr. Berfield at the time of his allocation is considered, the allocation should have, if anything, been $100 higher. As it turns out, in fact Mr. Berfield's figure for engineering expenses for the Red Lion permit in the amount of $2,425 was low by $100. Tr. 5471-72. In addition to the $7,275 figure that David Gardner had given to Mr. Berfield as the amount of the engineering costs of the Red Lion, Lebanon and Lancaster applications, Raystay had paid Mr. Hoover another $6,000 for six low power television frequency searches at the rate of $1,000 per location. Glendale Ex. 224 at 11, 113-16. Such searches were performed for Red Lion, Lebanon, Lancaster and three other locations for which no applications were filed. Glendale Ex. 224 at 11, 114. David Gardner testified that he recalled looking for an invoice reflecting payment over and above the $7,275, but he could not

find such an invoice. Glendale Ex. 227 at 2. Mr. Berfield was not aware of the additional $6,000 payment until it surfaced recently during the discovery phase of this proceeding. Glendale Ex. 224 at 11.

36. Mr. Berfield testified (a) that if he had known of the $6,000 payment for the six frequency searches, $3,000 of which applied to Red Lion, Lebanon and Lancaster, and (b) if he had seen Mr. Hoover's invoice for $7,275 and had applied Mr. Hoover's ostensible breakdown, the allocation would have been $2,525 in engineering expenses to the Red Lion application. Glendale Ex. 224 at 11-12. This is $100 more than the amount ($2,425) that he in fact allocated. The components of that higher figure would have been: $1,000 for the Red Lion frequency search, $1,350 for the Red Lion FCC application as billed by Mr. Hoover (one fifth of $7,500 less $750 discount), and $175 for the FAA filing for Red Lion as billed by Mr. Hoover (one-third of $525). Glendale Ex. 224 at 12, 117.

(3)
FCC filing fee

37. The FCC filing fee in the amount of $375 was the cost of a single application. It was taken from the law firm's records containing a copy of the Red Lion application as filed. Glendale Ex. 224 at 12.

III.
PROPOSED CONCLUSIONS OF LAW

A.
Applicable standards

38. The issue in question calls for a determination of

whether Raystay made misrepresentations or lacked candor in the application for assignment of the construction permit for Red Lion in which it certified that expenses in excess of $10,000 had been incurred for the purposes permitted in the Commission's rules and regulations securing the permit and preparing for placing the station in operation. 47 C.F.R. §73.3597(c)(2). The burden of going forward with the evidence and of persuasion was placed on Glendale. Memorandum Opinion and Order released October 4, 1993, FCC 93M-631, at 3. Whether the burden of persuasion has been carried is measured by the preponderance of the evidence taking into account the record as a whole. Steadman v. SEC, 450 U.S. 91 (1981).

39. A misrepresentation is (a) a false statement of an essential fact (b) made with an intent to deceive the Commission. Fox River Broadcasting, Inc., 93 FCC2d 127, 129, 53 RR2d 44, 46 (Commission 1983). Lack of candor is (a) the intentional failure to state an essential fact (b) for the purpose of deceiving the Commission. Id. The first required element of both misrepresentation and lack of candor is either a false statement of, or an intentional failure to state, an essential fact. The second required element of both misrepresentation and lack of candor is the intent to deceive.

40. The existence of a mistake or a falsehood, without a preponderance of the evidence that the party meant to deceive the Commission, does not constitute misrepresentation. Cannon Communications Corp., 5 FCC Rcd. 2695, 2700 (Rev.Bd.

1990)(upholding applicant which was in error regarding the location of its proposed transmitter site under circumstances in which the preponderance of the evidence showed the absence of an intent to deceive the Commission); Broadcast Associates of Colorado, 104 FCC2d 16, 60 RR2d 721 (Commission 1986)(upholding applicant who gave false deposition testimony and certified the application falsely, i.e., without the engineering portion attached, under circumstances in which the preponderance of the evidence showed the absence of an intent to deceive the Commission).

41. The disqualification of an applicant for misrepresentation or lack of candor is a harsh penalty which is exacted sparingly. The Review Board stated in Cannon Communications Corp., supra:

> Disqualification for misrepresentation is, in the words of Judge Mikva, "a blunderbuss," WADECO, Inc. v. FCC, 628 F.2d 122, 133 (D.C.Cir. 1980)(dissenting statement), and not to be triggered unless substantial evidence reveals serious and deliberate falsehoods.

5 FCC Rcd. at 2700. With respect to lack of candor, the failure to provide a more complete explanation does not constitute a lack of candor warranting the "blunderbuss" of disqualification. Cannon Communications Corp., supra, 5 FCC Rcd. at 2705, n. 18.

B.
Application of those standards
to the case at bar shows no basis
to disqualify Glendale for any
misrepresentation or lack of candor
on the part of Raystay

42. In the instant case, neither of the two essential elements of misrepresentation or of lack of candor has been shown

by the preponderance of the evidence taking the record as a whole. The preponderance of the evidence shows that there has been no false statement of, or intentional failure to state, an essential fact on the part of Raystay. This, alone, is dispositive of the issue in favor of Raystay and the applicant here, Glendale. The preponderance of the evidence also shows that there has been no intent on the part of Raystay to deceive the Commission. This, alone, also is dispositive of the issue in favor of Raystay and the applicant here, Glendale. The overall preponderance of the evidence is overwhelming in support of the good faith of these parties and the utter absence of any ground for disqualifying Glendale as a licensee of the FCC.

43. We shall discuss the preponderance of the evidence in three parts: (1) no false statement of an essential fact, (2) no intentional failure to state an essential fact and (3) no intent to deceive the Commission.

(1)
The preponderance of the evidence shows that no false statement of an essential fact was made to the Commission

44. The expense certification in the Red Lion application listed four cost figures. All were accurate and reasonable. None was false.

45. Legal fees. The expense certification listed a figure in the amount of $7,698 for legal fees. This represented one-half of legal fees in the total amount of $15,397.

46. The total figure was supported by invoices covering the entire amount and by the testimony of Mr. Berfield regarding the

services provided for those fees. He testified in detail regarding the reasons why all such services were rendered for purposes for which reimbursement is permitted under the Commission's rules and regulations. Proposed findings at ¶11. His testimony under cross examination supported and enhanced his direct testimony. And for sure, neither the government nor Trinity offered any contrary evidence on rebuttal. The preponderance of the evidence supports the accuracy of the figure in the amount of $15,397 as legal costs legitimately and prudently expended solely for preparing, filing and advocating the grant of the five low power television construction permits and for other steps reasonably necessary toward placing the proposed stations in operation, within the meaning of 47 C.F.R. §73.3597(c)(2). This figure was not a false fact.

47. The figure in the amount of $7,698 set forth in the expense certification relative to the Red Lion construction permit also was not a false fact. Of the total legal costs in the amount of $15,397, about one-third was a flat fee for the initial preparation of the five applications aggregating $5,200 and of this $4,000 was for the initial application and the remaining four almost identical applications accounted for the balance at the rate of $300 each. Red Lion was the initial application prepared by Mr. Berfield, who attended to this law work personally. Proposed findings at ¶¶23-24.

48. The remaining approximately two-thirds of the total legal costs in the amount of $15,397, or about $10,197, were fees

for amendments of the five applications, presentations to and consultations with the Commission relative to a showing of good character regarding George Gardner and the development of a compliance program necessary in order to secure a grant of the applications and also an integral part of the preparation of the prospective new low power television stations to become operational. At that point in time, there were no other pending applications for FCC authorizations in which George Gardner had an interest, these applications were the sole vehicle for him to make such a presentation to the Commission, and it was absolutely necessary that such presentation be successfully made to the FCC if Raystay were to secure a grant of the construction permits. Proposed findings at ¶25.

49. This law work applied to the five applications and permits in the aggregate. The same law work would have been required if there were only one application. The cost of this law work was a legitimate and prudent expense relative to each and any of the five applications. It could not have been claimed for all five, of course, but that was never done or intended. It could have been claimed for any one of the applicants, and that is what was done here, for the first (and only) permit to be sold.

50. Given that Red Lion was the first application to be prepared, at a quoted fee of $4,000, and could legitimately claim the entire approximately $10,000 for the other subsequent legal costs, it was accurate for Mr. Berfield to testify that

approximately 90% of the $15,000-plus in total legal costs could have been allocated to the Red Lion permit, and that his allocation of 50% of those total legal costs was conservative. On direct examination Mr. Berfield explained his reasoning in making the allocation. He validated that reasoning under cross examination. No rebuttal evidence was offered. The preponderance of the evidence supports his analysis.

51. It is concluded that the figure of $7,698 in the Red Lion certification for legal costs was accurate. This was not a false fact.

52. Engineering fees. The expense certification listed a figure in the amount of $2,425 for engineering fees. This represented one-third of the engineering fees which Mr. Berfield believed were the total at the time of his allocation, i.e., $7,275. At the time Mr. Berfield made the engineering allocation (1991) and at the time Trinity petitioned for the reimbursement issue (1993), it was not known that there was an additional $3,000 in low power engineering fees, consisting of $1,000 for each of the frequency searches for the three sites (Red Lion, Lebanon and Lancaster) on which Raystay filed low power applications. Thus, Trinity's August 27, 1993 petition, at 6-7, asserted on the basis of its reading of the March 31, 1989 Hoover invoice that the correct figure for the Red Lion engineering allocation was $1,525, consisting of $1,350 for the application and $175 for the FAA filing. Neither Trinity nor Glendale addressed the additional $3,000 in engineering fees in the

petition to enlarge stage since that fact had not yet surfaced. It should be emphasized that, when those additional fees are considered, even under Trinity's theory of the Hoover invoice the engineering fees attributed to Red Lion would have been $2,525, or $100 more than Raystay listed in its certification. Thus, under no theory can it be found that the listed engineering expense of $2,425 in the Red Lion assignment application certification was false or inflated. Proposed findings at ¶¶27, 35-36.

53. To the extent it has any relevance, the original allocation of one-third of the then-known engineering fees to Red Lion was an accurate determination on Mr. Berfield's part, who was aware of a composite of engineering services that had been rendered by Mr. Hoover:

(a) He was aware that at the outset, Mr. Hoover conducted studies of the frequencies that would work for low power television stations in the three communities of Red Lion, Lebanon and Lancaster, and he prepared comprehensive reports of those studies that included lengthy and detailed narratives, tabulations of the mileage separations from other television channels required under the Commission's spacing requirements, and maps showing the potential signal coverage of the frequencies in these three communities and surrounding areas. These services warranted a division of the engineering fee into thirds. Proposed findings at ¶28.

(b) Mr. Berfield was aware that the engineering portions of

the two Lebanon applications, involving the same transmitter site, were substantially similar to each other. And he was aware that the same thing was true regarding the two Lancaster applications, also involving the same transmitter site. For this reason, in his mind the per-application engineering work was less for these four applications than it was for the Red Lion application as a single facility without any such companion application. This militated against a linear spreading of the engineering fee uniformly over the five applications, i.e., allocating one-fifth to each one. Proposed findings at 30-32.

(c) Mr. Berfield was aware that engineering work was performed to secure approval of the transmitter site proposals from the FAA. Since there were only three transmitter sites, this clearly merited an allocation of at least one third to the Red Lion application. The Red Lion application was the first one processed by the FAA and was the application in which the FAA required special evidence to demonstrate that electromagnetic interference (EMI) would not be caused to radio operations in aircraft. Proposed findings at ¶29. [8]

---

[8] In that time period (circa 1989), EMI was a major problem in dealing with broadcast applications. The FAA was concerned about the then recent growth that was being experienced with this type of interference, it did not have rules or standards to deal with EMI, and as a result it required special engineering showings and in many instances refused to accept such showings or approve transmitter site proposals without conditions that broadcast operations must cease if actual interference occurs once a station goes on the air. Mr. Hoover successfully ran this gauntlet with a persuasive engineering showing in connection with the Red Lion application, and portions of that showing were submitted to secure clearance of the Lebanon and Lancaster applications. Glendale Ex. 224 at 80, 82, 99, 107.

54. Mr. Berfield, thus, was dealing with a mix of (a) three frequency searches and related comprehensive reports, (b) preparation of four FCC applications for Lebanon and Lancaster at a lower per-application cost than the single Red Lion application, (c) filing three requests for approval of the transmitter sites with the FAA, and (d) use of the Red Lion request as the vehicle to deal with the difficult FAA problem regarding electromagnetic interference and secure FAA clearance of the Lebanon and Lancaster transmitter site proposals. Mr. Berfield's allocation of $2,425 or one-third of the figure he thought to be the total for all of Mr. Hoover's engineering services described above was a reasonable allocation that has been supported as such by the preponderance of the evidence in the record.

55. Mr. Berfield testified at length on this subject both in his direct testimony and under cross examination. In weighing this evidence against all of the other evidence in the record, the following should be considered:

(a) Mr. Berfield did not see a copy of Mr. Hoover's invoice when he made the good faith and reasonable allocation reflected in the record evidence and described above. Proposed findings at ¶27.

(b) Mr. Berfield was not aware of the additional $3,000 engineering fee for that work when he made the good faith and reasonable allocation reflected in the record evidence and described above. Proposed findings at ¶35.

(c) Upon seeing the invoice and applying the engineering fee in the total amount of $7,275 as billed by Mr. Hoover, and upon learning of the additional $3,000 payment for the three frequency searches and reports, Mr. Berfield determined that his allocation of the engineering fees for the Red Lion construction permit ($2,425) had if anything understated the engineering fees for the Red Lion construction permit ($2,525), taking into account the most conservative (i.e., Trinity's) view of the invoice and the additional payment, by the sum of $100. Proposed findings at ¶36.

56. It is concluded that the allocation in the amount of $2,425 for engineering fees contained in the expense certification filed by Raystay was accurate. This was not a false fact.

57. FCC filing fee. The expense certification listed a figure in the amount of $375 for the FCC filing fee. This expense applied directly and exclusively to the Red Lion application. Proposed findings at ¶37. Accordingly, it is concluded that this figure was not a false fact.

58. Total amount allocated. The expense certification listed a figure in the amount of $10,498 as the arithmetic total of the three figures discussed above. The component expense figures are accurate and are not false. Accordingly, it is concluded that this figure was not a false fact.

(2)
The preponderance of the evidence shows that there was no intentional failure to state an essential fact to the Commission

59. The Commission's rules provide that parties seeking reimbursement of expenses shall include in the application "an itemized accounting of such expenses, together with such factual information as the parties rely upon for the requisite showing that those expenses represent legitimate and prudent outlays made solely for the purposes allowable" under the regulation in question. 47 C.F.R. §73.3597(c)(3)(ii). The FCC application form in question here, FCC Form 345, and the related instructions, provide no further details concerning what is to be submitted with the application on this score.[9]

60. Raystay did submit an itemized list of expenses describing the categories and providing the dollar figures. Nothing more was required and the Commission's staff so indicated by the routine grant of the application without requesting any supporting documents or other details.

61. With respect to this itemized list of expenses, there is no valid basis to hold that Raystay was required to detail information concerning its allocation of expenses among more than one construction permit, for the following reasons:

62. First, the Commission's staff did not ask for such information. And it could well have done so. This was one of five construction permits that were filed by Raystay and granted

[9] FCC Form 345 and Instructions, dated October 1987. Copies are attached for handy reference in the appendix.

by the Commission at about the same time, a fact readily discernible by the Commission's staff in a brief moment from a check of its computerized records employing any handy computer terminal in the office. Moreover, this is a pattern that the low power television staff is familiar with, since the Commission opens periodic windows for the filing of no more than five applications by the same party, and often applications by the same party are received and processed in batches of five. Indeed, Raystay had extension applications on file for the other four construction permits held by it at the very time the Red Lion assignment application was filed -- the four extension applications were filed on December 20, 1991 and the Red Lion assignment application was filed on January 14, 1992; the four extension applications were processed and granted on January 29, 1992 and the Red Lion assignment application was processed and granted in March 1992. An intent to deceive cannot be inferred when information can be deduced from the Commission's own files. Superior Broadcasting of California, 94 FCC2d 904, 909-910, 54 RR2d 773, 777 (Rev.Bd. 1983).

63. Second, citizens are entitled to know the rules by which federal agencies govern them with reasonable certainty. See, e.g., the Administrative Procedure Act, 5 U.S.C. §§552-53 (federal agencies must promulgate substantive and procedural rules applicable to citizens who deal with those agencies); the Federal Register Act, 44 U.S.C. §1505 (federal agency rules of general application must be published in the Federal Register);

Salzer v. FCC, 778 F.2d 869 (D.C.Cir. 1985)(low power television application should not have been rejected by the Commission for failure to file information concerning lottery attributes at the time and in the manner set forth in vague and ambiguous notices); McElroy Electronics Corporation v. FCC, 990 F.2d 1351 (D.C.Cir. 1993)(cellular application should not have been rejected for failure to follow an order that was not clear regarding the time and manner of filing for an authorization to serve unserved portions of MSA areas). Here, the Commission's rule does not call for the submission of any particular kind of detailed information relative to the required itemization of expenses. It merely refers to "an itemized accounting of such expenses" without further explanation either of the required manner of presenting that accounting or the required contents of that accounting. There was no notice to Raystay that it was required to give details of its allocations, nor notice that by submitting the expense certification sans any reference to the allocation process, Raystay was failing to state an essential fact.

64. Third, there was no rational reason for Raystay and its counsel to conceal the allocation process as an essential fact which it did not want to disclose to the Commission. As the hearing record clearly shows, that allocation process was done accurately, based on a thorough study of the invoices and available time records of the law firm. And it was done honorably. If Raystay had previously allocated 50% of its costs each to two of five construction permits, thus securing 100%

reimbursement of all costs, and thereafter undertook to file a third reimbursement request without disclosing the allocation process, that would be the intentional failure to state an essential fact. But the record is crystal clear that nothing of that nature was done, intended or ever contemplated here.

65. For these reasons, i.e, (a) the Commission's staff was in the position to know that an allocation was involved and did not request information concerning the allocation process, (b) the Commission's rule did not give fair or valid notice that the use of an allocation was an essential fact to be disclosed in the expense certification, and (c) there was no reason for Raystay to conceal the allocation which had been performed accurately and honorably as demonstrated in this hearing record, it is concluded that there was no failure on the part of Raystay to state an essential fact by virtue of the presentation of an itemization of three categories of expenses without stating that expenses of multiple construction permits had been allocated.

(3)
The preponderance of the evidence shows that there was no intent on the part of Raystay to deceive the Commission

66. It is not overreaching to say that there is no credible evidence in this record that Raystay had any intention of deceiving the Commission in the preparation and filing of the Red Lion expense certification.

67. The expense itemization set forth in the certification was prepared by communications counsel with 35 years of experience who had continuously served George Gardner and his

companies for approximately 30 years. That counsel, Mr. Berfield, conscientiously assembled information including a comprehensive review of his law firm's invoices and available attorney time records, first with regard to expenses for all five of the construction permits, and then, with regard to a conservative allocation of a portion of those expenses that could validly be assigned to the Red Lion permit.

68. The Commission's regulation provided no guidance as to how to handle the matter of allocating expenses to one of a group of construction permits. Mr. Berfield went to the law books and found a single adjudicated and published opinion on that subject, the Integrated Communications case. That case involved the settlement of a comparative hearing upon dismissal of an application for reimbursement of its expenses, rather than the sale of an unbuilt construction permit, as here. The Commission's then Broadcast Bureau and the Commission's Review Board approved a statement of expenses that was made by communications counsel based on a study of invoices and time records.

69. In that particular case, the study of the invoices and time records showed that one-third of the legal services had been spent on the application that was being dismissed, which was one of three applications. Accordingly, on the facts contained in those invoices and time records, the study supported an allocation of one-third of the total legal costs to one of three applications. However, this was an application for a full power

television station in the 1960's when such applications were customized with individual programming showings and other individualized information, in contrast to the "cookie-cutter" nature of the multiple low power television applications that Mr. Berfield was dealing with.

70. The Integrated Communications decision provided the principle and methodology, employed by Mr. Berfield, of gearing his allocation to a study of the facts reflected in the invoices and time records of his law firm regarding these "cookie-cutter" low power television applications and the ensuing legal work of uniform applicability to all five applications. On that score, this Court stated on the record here:

> Judge Chachkin: I must say that I had another chance to read Integrated and I read it a little more closely. And I don't think what I said in my Order, setting these issues, was entirely correct. Because I don't think this case necessarily stands for the proposition that the Commission approved the one-third allocation. Because if you read Integrated and you see what the next sentence says and they talk about the Bureau, in fact, the case deals with the largest single expense and I have a copy here. And, I've had a chance to look at it more closely and it talks about the largest single expense was $8,664.84 for legal fees.
>
> United Artists had three applications at that time and they wanted to take one-third of the total billing for legal fees and service in connection with all three applications. The next sentence says the Bureau opposed it on the grounds that it was not properly identified with costs in connection with the preparation and prosecution of the Boston application.
>
> United Artists submitted a second affidavit from its counsel, which alleged that the time records had been searched and that one-third of the total cost was a proper allocation and that the figure $8,664.84 had, in fact, been expended in connection with the Boston application. If you read that closely, now, it doesn't necessarily say that you can allocate one-third to each application. Although I must say I did agree with TBF that that's what the case stood for. Because the Commission did say that the actual figure

> was, in fact, expended. They didn't say that one-third was a proper allocation. They, it was only on the basis because of the Bureau's objections, I might add, it was on the basis of counsel's submitting a subsequent document saying that that particular amount had actually been expended on behalf of Boston.
>
> So I think we should set the record straight that Integrated does not necessarily stand for the proposition that TBF urged, it stood for. I think I did just set the record straight now that I've reread the case and nowhere do I find that the Commission said that it's proper to allocation one-third if you have three applications. Particularly when you have such disparate applications as broadcast stations which involve entirely different problems and are really not common costs to start with.
>
> As far as I know, no broadcast applications are common costs in three communities. So, I think we're dealing with an entirely different animal in this case than we are, first of all, was involved in Integrated, and secondly, no where do I find anything in Integrated which diverges from, from the, the ordinary principle that you have to show reasonable and fair expenses.

Tr. 5599-5601.

71. The hearing record shows that reasonable and fair expenses were allocated here. Mr. Berfield's detailed and comprehensive analysis of those records in establishing legal costs has withstood full evidentiary scrutiny in this proceeding, and has not been impeached or shown to be in error. The engineering fee has been shown to be reasonable based upon testimony and numerous documents received in evidence regarding the disparate types of engineering services that had been provided to Raystay, as observed by and known to Mr. Berfield at the time of his allocation. Indeed, when in the course of this proceeding, the engineer's invoice was subsequently uncovered along with the discovery of an additional payment to the engineer, Mr. Berfield's allocation turned out to be -- even by

Trinity's reckoning -- almost on the button, and, if anything, it was $100 too low.

72. There is contemporary evidence of the bona fides of Raystay in the matter. When the $10,000 allocation of expenses to the Red Lion permit was under consideration -- a nonlinear allocation of more expenses to that permit than would therefore be available to each of the other four permits -- Raystay did not have any strategy of then applying that disproportionately large amount across the board to make an unlawful and dishonest profit in the disposition of all five permits. To the contrary, Raystay added up the potential prices then on the table for all five permits -- the $10,000 price for Red Lion which had been negotiated with Mr. Grolman and the $5,000 price each for the other four permits that had been offered by Trinity -- and asked Mr. Berfield if the resulting $30,000 total consideration could be proved as acceptable to the Commission.

73. This is not some form of exculpatory evidence that was created subsequently in preparation for the hearing in this matter. This is evidence consisting of a letter dated in November 1991 at the time of the operative facts in which the $30,000 is expressed as the amount targeted by Raystay and evaluated by Mr. Berfield in his tabulation of expenses. This is evidence consisting of memoranda, offers, confirmations of discussions and drafts of agreements in October and November 1991 at the time of the operative facts in which the $10,000 price as negotiated with Mr. Grolman is established and the $5,000 per

permit offer by Trinity is established.

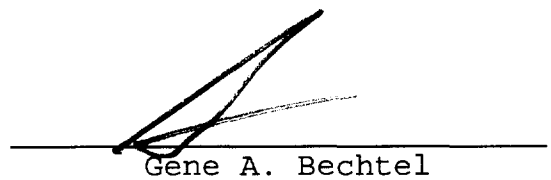
74. Mr. Berfield and Raystay had no earthly reason to be concerned about disclosing any of the information about the allocation to the Commission. There was no reason for Mr. Berfield or Raystay to have a shred of guilty scienter in the matter. Nor did they. Nor do they. The absence of any mention of the allocation process in the certification is a benign circumstance fully consistent with innocence of any wrongdoing and entirely devoid of any rational connotation of wrongdoing. This was a certification of expenses in the amount of $10,000. It was filed in relation to an unbuilt low power television construction permit for which reimbursement amounts tend to be modest and the expense certifications understandably also tend to be modest. To the (correct) belief of Mr. Berfield and Raystay, the homework showed that the tabulation of expenses for all five construction permits was accurate and valid, and the allocation made to Red Lion permit was also accurate and valid. There was no smoking gun or Achilles' heel here. The expense certification was a straight-forward piece of law work, done competently and efficiently without unnecessary descriptions, attachments or other paperwork.

IV.
Conclusion

75. Taking the record as a whole, the clear preponderance of the evidence is that Raystay has made no false statement of an essential fact, that Raystay has not failed to make a statement of an essential fact and that Raystay has not intended to deceive

the Commission. None of the elements of misrepresentation has been established. None of the elements of lack of candor has been established. The Red Lion assignment application issue should be resolved in favor of Glendale which, under this issue, is qualified to become a licensee of the Commission.

Respectfully submitted,



Gene A. Bechtel

Bechtel & Cole, Chartered
Suite 250
1901 L Street, N.W.
Washington, D.C. 20036
Telephone 202-833-4190
Telecopier 202-833-3084

Special counsel for Glendale
Broadcasting Company

August 15, 1994